

Bob BRISCOE, *et al.*  
Serial No. 10/593,423  
July 19, 2010

### **REMARKS/ARGUMENTS**

Reconsideration of this application is respectfully requested.

The Examiner's remarks with respect to copending application Serial No. 10/593,442 (which is also being concurrently examined by the same Examiner) are perhaps not understood. The Examiner's reminder that "applicant has the duty to disclose for the filing of >a< application (37 CFR 1.56) which is not limited to just the dealing with the Examiner (MPEP 2001.03)" is a non-grammatical statement. If the Examiner is attempting to remind the undersigned that the duty of disclosure under Rule 56 extends to the "office" rather than just to an Examiner (e.g., to proceedings before the Board of Patent Appeals and Interferences, etc.), that is, of course, well understood. If the Examiner has some other intended meaning, then it is requested that such be clarified.

Similarly, the Examiner's reference to MPEP 2001.06(b) is puzzling since the verbiage used by the Examiner is only included as a partial quote from a 1972 case from the 7<sup>th</sup> Circuit. It does not come from the Federal Circuit or the Supreme Court – or from any Federal regulation or even from the MPEP text *per se*. It also ignores the fact that current U.S. law places the burden of searching for prior art, etc., with the Examiner. This entire section of the MPEP is conditioned so as to apply only to that which is "material" under Rule 56 which, *inter alia*, requires that "material" information

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be that which is "known to that individual to be material to patentability as defined in this section".

Frankly, the on-going office actions and responses, etc., in the related copending application Serial No. 10/593,442 are not considered by the undersigned to be "material" to the proceedings in the present application which are being handled by the same Examiner. Indeed, many Examiners still refuse to initial such submissions as even having been "considered" (e.g., because such do not constitute prior art documents). They simply line through such document listings. Further, in the extreme limit, the process becomes a never-ending one that is impossible to fully satisfy. Eventually, one of a plurality of related applications will issue and it will thereafter not be feasible to continue to file copies of on-going proceedings from the other still pending cases in the now issued case. The Examiner (whether it be the same Examiner or a different Examiner) has immediate electronic access to the entirety of the IFW for a related case. It should suffice to simply disclose the existence of the related case and ask the Examiner, to whatever extent he/she desires, to review the IFW in the other case(s) rather than requiring over-burdening the record in each of these cases by replicate cross-filings of duplicate copies of papers in every one of a plurality of related cases.

Nevertheless, as a courtesy to the Examiner, and in the absence of any clear-cut indication whether the Examiner wishes to continue receiving office actions/responses from related application Serial No. 10/593,442, and because such can be submitted at

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this point in time without the necessity for further official fees, a copy of USPTO correspondence in related application Serial No. 10/593,442 occurring subsequent to November 13, 2009, is attached.

In response to the continued rejection of claims 4-5 and 13 under 35 U.S.C. §112, second paragraph, the objected to phrase "such as" now has been deleted from these claims. The Examiner is thanked for pointing out the inadvertent omission of such amendment in prior submissions. Accordingly, all outstanding formality-based issues are now believed to have been resolved in the applicants' favor. If the Examiner believes that there is any remaining formality issue, the Examiner is respectfully requested to telephone the undersigned for prompt resolution.

The rejection of claims 1-3, 6-12, 14-16, 20-23 and 28-31 under 35 U.S.C. §102 as allegedly anticipated by Cain '469 is again respectfully traversed.

The Examiner is thanked for providing an explanatory "response to arguments" section in the last office action. The following remarks (and the above amendments) are intended to respond in a manner that hopefully the Examiner will agree places this application in allowable condition. If the Examiner still finds the applicants' claims to be unpatentable for any reason, then it is respectfully requested that the undersigned be telephoned for an interview.

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In response to applicants' previous argument that Cain does not disclose anything corresponding to a *"target condition for the path characterization metric"* and, therefore, also fails to disclose any step of feeding back *"information indicative of a discrepancy between the condition of the received path characterization metric and the target condition for the path characterization metric"*, the Examiner has now clarified the rejection by explaining that the "initial QoS metric" in Cain (as set by the source node) is regarded as corresponding to the "target condition for the path characterization metric" of applicants' claim 1, and the "updated QoS metric" (i.e., the metric that is carried from the destination node to the source node by Cain's "RREPQ packet" and is updated on the path) is regarded as indicating the condition of the path characterization metric in respect of data received by the receiver node as set out in applicants' claim 1.

The Examiner's analysis fails, however, to take account of a difference that exists between the applicants' claimed invention and Cain. Even if Cain's "RREPQ packet" is assumed to allow the source node to determine that there was a discrepancy between the "initial QoS metric" and the "updated QoS metric", Cain's "RREPQ packet" does not allow Cain's source node to know or determine a measure of what that discrepancy was (e.g. how big it was, etc.). It, therefore, does not allow Cain's source node to adjust the initial condition by an amount dependent on what the discrepancy was (e.g., how big, etc.).

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With the previous wording of applicants' claim 1, the penultimate sub-paragraph stated that the receiver node is arranged to make available for the provider node *"...**information indicative of a discrepancy** between the condition of the path characterization metric in respect of data received by it and a predetermined target condition for the path characterization metric..."*. It appears that the Examiner is interpreting the wording in bold simply as meaning *"...information indicative of the existence of a discrepancy..."*, rather than as meaning *"...information indicative of a measure of any discrepancy..."*.

In order to ensure that the Examiner's apparent interpretation is clearly excluded, and in order to ensure that the wording of claim 1 explicitly brings out the distinction outlined above, the wording of the last two paragraphs of claim 1 has been amended to state:

said receiver node is arranged to make available for the provider node discrepancy information indicative of a measure of any discrepancy between the condition of the path characterization metric in respect of data received by it and a predetermined target condition for the path characterization metric; and wherein

said provider node is arranged to assign a different initial condition to the path characterization metric in respect of subsequent data provided by it in the event that it receives discrepancy information from said receiver node, the initial condition assigned in respect of said subsequent data units differing from the initial condition assigned in respect of previous data units by a difference dependent on said discrepancy information.

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This amendment serves to clarify the distinction whereby, with the claimed invention, action is taken to adjust the initial condition of the path characterization in dependence not just on **whether or not** there is “a discrepancy”, but in dependence on **a measure of what that discrepancy was**. The term “discrepancy information” has been introduced in the penultimate sub-paragraph in order to simplify the wording in the final sub-paragraph, which then clarifies that the initial condition assigned in respect of subsequent data units differs from the initial condition assigned in respect of previous data units “by a difference dependent on said discrepancy information”.

As will be understood, even if the “RREPQ packet” in Cain is assumed *arguendo* to allow the source node to determine that a discrepancy existed between the “initial QoS metric” and the “updated QoS metric”, it does not allow the source node in Cain to adjust the initial condition in respect of subsequent data by an amount dependent on a measure of what that discrepancy was, because the “RREPQ packet” does not provide such information to the source node.

Independent claims 9, 11, 20, 24, 26 and 28 have all been similarly amended and thus exhibit at least the above-noted patentable distinction over any teaching of Cain.

Accordingly, it is not necessary at this time to detail additional deficiencies of Cain with respect to other aspects of the rejected claims. Suffice it to note that, as a

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matter of law, it is impossible to support even a *prima facie* case of anticipation unless the single cited reference teaches each and every feature of each rejected claim.

The rejection of claims 4-5 and 13 under 35 U.S.C. §103 as allegedly being made "obvious" based on Cain in view of Kalyanasundaram ("Kal") '311 is also respectfully traversed.

Fundamental deficiencies of Cain have already been noted above for a parent claim. Kal does not supply those deficiencies and, accordingly, it is not necessary at this time to detail additional deficiencies of this allegedly "obvious" combination of references with respect to other aspects of these rejected claims. Suffice it to note that, as a matter of law, it is impossible to support even a *prima facie* case of "obviousness" unless the cited collection of prior art at least teaches or suggests each and every feature of each rejected claim.

Similarly, the rejection of claims 17-19 under 35 U.S.C. §103 based on Cain in view of Tanaka '538 is also respectfully traversed.

As before, fundamental deficiencies of Cain have already been noted above with respect to a parent claim, and Tanaka does not supply those deficiencies. Accordingly, it is not necessary at this time to detail additional deficiencies of this allegedly "obvious" combination of references with respect to other aspects of these rejected claims.

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The rejection of claims 24-27 under 35 U.S.C. §103 as allegedly being made "obvious" based on Cain view of Ozugur '901 is also respectfully traversed – for the same reason (i.e., Ozugur does not supply the already noted fundamental deficiencies of Cain with respect to a parent claim).

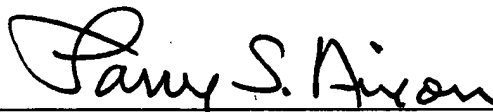
Claims 30 and 31 have been cancelled with prejudice or disclaimer, thus mooted any outstanding ground of rejection with respect to those claims.

Accordingly, all outstanding issues are now believed to have been resolved in the applicants' favor, thus leaving this entire application in allowable condition. A formal notice to that effect is earnestly solicited.

Respectfully submitted,

**NIXON & VANDERHYE P.C.**

By: \_\_\_\_\_



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